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No. 84-538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDAHL,

Petitioner,

v.

BRUTON SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 1, of the United States Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

After Smith notified Snyder by letter dated January 31, 1977 of his election to purchase Liljedahl's partnership interest, Smith negotiated for the purchase, several times returning to Illinois for that purpose. Contrary to Snyder's implication that Smith was obstreperous, Smith's efforts were consistent with the provision of the Partnership Agreement directing the parties to attempt to agree upon a price for the deceased partner's interest. The Partnership Agreement further provided that upon failure to agree on the value of the partnership interest, the value

would be settled by arbitration in the City of Houston, Texas, where the partnership transacted its only business. The purchase negotiations were unsuccessful (App. 33)[1]. The Partnership Agreement stipulated that it was to be governed by Texas law.

Snyder's first and only demand for arbitration was dated July 14, 1980 and was a demand for arbitration in Rockford, Illinois in contravention of the arbitration clause in the Partnership Agreement (App. 1, 2). Smith's counsel, Vinson & Elkins of Houston, Texas, rejected the demand for arbitration, stating that "[t]he demand for arbitration is not in accordance with the Viking Investment Associates partnership agreement." (App. 52.)

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[1]App. refers to Snyder's Appendix.

On July 28, 1980, Smith filed suit in a Texas State Court requesting the court to establish the price for Liljedahl's partnership interest and alleging a cause of action for breach of the Partnership Agreement (App. 33, 34). Snyder removed the case to the United States District Court in Houston on the ground of diversity.

In lieu of filing a counterclaim for arbitration of the issues in Smith's Texas action, Snyder filed a petition to compel arbitration of those issues in the United States District Court for the Northern District of Illinois. Smith opposed the petition to compel arbitration upon the grounds that the district court in Illinois lacked personal jurisdiction of him, lacked subject matter

jurisdiction, and could not compel arbitration in contravention of the arbitration clause (App. 31, 32).

Smith moved to vacate or modify the arbitrators' award (App. 23, 34) upon the grounds that the court lacked both subject matter and in personam jurisdiction required to confirm or enter judgment upon the award and that the arbitrators had exceeded their powers. The district court denied Smith's motion.

Upon the call of this case in the Court of Appeals, Snyder for the first time moved ore tenus for dismissal upon the grounds that Smith's Notice of Appeal[2] from the judgment in favor of Snyder[3] gave the Court of Appeals no jurisdiction of Smith's appeal. Snyder's petition

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[2]Filed June 17, 1983 (App. i).

[3]Docketed May 20, 1983 (App. i).

states essentially the same grounds, i.e., "the Seventh Circuit lacked subject matter jurisdiction over Smith's untimely appeal and, therefore, should have dismissed the appeal without reaching the merits." (Pet. 16.)

The Court of Appeals held:

> Thus, the district court in this case had no power under the statute to order arbitration in its district in contravention of the parties' agreement.

(App. 47.)

The Court of Appeals appropriately distinguished the jurisdictional decision of this Court relied upon here by Snyder, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) (App. 37, 38).

ARGUMENT

I.

There Is No Division Among The Circuits.

The circuit courts of appeals are not divided in their decisions under Section

Four of the Federal Arbitration Act on the issue of the enforcement of situs clauses in arbitration agreements. The decisions of the other circuit courts, on the contrary, illustrate the respect accorded freely-negotiated situs provisions. These decisions recognize that an arbitration agreement is simply a contract to be enforced in accordance with the agreements between the parties. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979). Courts have been uniformly unwilling to rewrite the contract between the parties. New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1891). The opinion of the Seventh Circuit in the instant case is consistent with this well-settled practice of enforcing the agreement between the parties as negotiated and written.

Snyder erroneously contends that the Ninth Circuit adopted a construction of Section Four of the Federal Arbitration Act [hereinafter "Section Four"] which directly conflicts with the majority opinion in the Seventh Circuit. A careful reading of the decision in Continental Grain Co. v. Dant & Russell Inc., 118 F.2d 967 (9th Cir. 1941), the case relied on by Snyder, indicates that the situation before the court in that case was inapposite to the one at hand. In Continental Grain, the Ninth Circuit Court of Appeals affirmed an Oregon District Court's order compelling arbitration in Oregon, despite an express clause in the arbitration agreement providing for arbitration in New York. The appellant in that case, however, was the party who had originally invoked the jurisdiction of the Oregon court by applying to it for an

order compelling arbitration. The Ninth Circuit did not hold, as Snyder contends, that the statutory provision requiring that a court only compel arbitration within its district took precedence over the clause selecting New York as the situs for arbitration. Rather, the court based its holding on the appellant's waiver of his right to contest an order compelling arbitration when the appellant himself had instituted the proceedings in Oregon. Therefore, Snyder's claim that a different result would have been reached in the case at hand had the case been brought in the Ninth Circuit is lacking in substance.

Moreover, there is no basis for Snyder's contention that a similarly situated litigant in the Fifth Circuit Court of Appeals would obtain a different result in that circuit than in either the

Seventh or Ninth Circuits; the Fifth Circuit has simply not addressed the issue of the enforceability of a situs for arbitration provision in the procedural context presented by either the instant case or by the Continental Grain case in the Ninth Circuit. In the unusual case of Duphy Bushing General Agency v. Ambassador Insurance Company, 524 F.2d 1275 (5th Cir. 1975), the Fifth Circuit Court of Appeals deemed the parties choice of the location for arbitration to be so important that it affirmed a district court's order compelling arbitration outside of its district. In that case, the United States District Court of the Southern District of Mississippi compelled arbitration in New Jersey where the motion to compel arbitration was a compulsory counterclaim to a suit brought in Mississippi for injunctive relief against

arbitration. The motion to compel would have been barred by res judicata had it not been raised in Mississippi. The Fifth Circuit emphasized the parties' "Section 4 right to have the arbitration agreement performed in accordance with the terms of the agreement." Id. at 1278. The Court explained its holding, stating that it would not "create a procedural trap by which a party to an arbitration agreement might be deprived of its contractural right to arbitration at the location specified in the agreement." Id. at 1277-78. If Snyder in the instant case had prevailed, the Seventh Circuit decision would have conflicted with the position of the Fifth Circuit in allowing a party to negate a situs for arbitration provision by winning the race to the courthouse in a foreign district. It is instructive to note that the Fifth

Circuit specifically found that its enforcement of the situs term was not inconsistent with the result reached by the Ninth Circuit in Continental Grain. Id. at 1277.

Snyder also relies on the decision of the Third Circuit Court of Appeals in Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 499 F.2d 1391 (3rd Cir. 1974) in her attempt to create confusion among the circuits. The Third Circuit's holding in Econo-Car is consistent with, rather than contrary to, the Seventh Circuit's opinion in the case at hand. In Econo-Car, the court held that a district court did not have the power to either compel arbitration outside of the district in which the petition was filed or to compel arbitration within its district in disregard of the terms of the arbitration agreement. In

that case, the District Court of the Virgin Islands had compelled arbitration in New York in accordance with the terms of the arbitration agreement. The Court of Appeals reversed the district court and dismissed the case. The appellate court refused to remand the case to the district court with instructions that the court order arbitration within the Virgin Islands. The district court simply had no power to compel arbitration whatsoever when arbitration was to occur in a foreign jurisdiction pursuant to the arbitration agreement. The court stated that:

> [A] party who seeks arbitration in a district court properly having venue may well be unable to secure an arbitration order in such district court in circumstances like those presented by this case.

499 F.2d at 1394.

The Seventh Circuit in the instant case, like the Third Circuit in Econo-Car, held that the district court was without power to order arbitration in its district in disregard of the terms of the arbitration agreement and moreover, that the district court could not order arbitration outside of its district. The Seventh Circuit stated that:

> The district court in this case, under the FAA, could not order arbitration in the Northern District of Illinois. The district court, under the FAA, also could not order arbitration in Houston, Texas. In a case such as this, where the petition to compel arbitration was the only relief sought, the district court should dismiss the petition or, upon motion, stay its proceedings.

(App. 47.)

Snyder also cites the United States District Court for the Southern District of New York's most recent interpretation of Section Four, Couleur International Ltd. vs. Saint Tropez West, 547 F. Supp.

176 (S.D.N.Y. 1982) for the proposition that a district court may not compel arbitration outside of its own district. Smith has never contested that the power of a court to compel arbitration is limited by the statutory provision in Section Four that a court may only compel arbitration within its district. However, Smith has argued, and the Seventh Circuit has so held, that a court may not compel arbitration in disregard of the terms of the arbitration agreement. The result is that if the arbitration agreement specifies situs, the only and proper district in which to file a motion to compel is the one which has jurisdiction over the selected location for arbitration. The decision in Couleur is consistent with the decision of the Seventh Circuit. In Couleur the arbitration agreement sought to be enforced by the defendant in a New

York Court called for arbitration in California. The United States District Court for the Southern District of New York held that it lacked the power to compel arbitration in California, stating that:

> This motion simply was made in the wrong district. What defendant should have done was to seek to have this action stayed pursuant to Section 3. (Citations omitted.) The proper place to obtain the relief defendant seeks on this motion is California.

Id. at 178.

The decision of the Seventh Circuit, rather than creating "uncertainty" by its interpretation of the Federal Arbitration Act recognizes that arbitration will be utilized as a viable alternative to litigation only when the agreement between the parties is respected. If the holding in the Seventh Circuit had been different, the resultant uncertainty as to which

terms of an arbitration agreement are enforceable surely would have served as a disincentive to the use of arbitration in the future. More importantly, the Section Four requirement that arbitration be compelled in accordance with the terms of the agreement would have been violated. The decision of the Seventh Circuit reconciled the Section Four requirement that a court can only compel arbitration within its district with the requirement that arbitration must be compelled in accordance with the terms of the agreement.

II.

The Timely Notice Of Appeal From The Docketing Of The Money Judgment Gave The Court Of Appeals Jurisdiction.

Snyder's contention that the Court of Appeals had acquired no jurisdiction by Smith's timely notice of appeal from final judgment lacks merit.

The jurisdiction of the Court of Appeals was provided by 28 U.S.C. § 1291. That statute gave the Court of Appeals "jurisdiction of appeals from all final decisions of the district courts ...." [Emphasis added.]

The award of the arbitrators was for $549,755. The judgment docketed by the district court on May 20, 1983 was for the sum of $576,041.59. The docketing of this judgment was a final appealable decision within the purview of 28 U.S.C. § 1291. Mr. Justice Jackson and Mr. Justice Frankfurter stated the generally accepted view that "[w]hile a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." [Emphasis added.] Stack v. Boyle, 342 U.S. 1, 12, 72 S. Ct. 1, 7 (1951) (separate opinion).

Smith moved to vacate or modify the arbitrator's award upon grounds that the district court lacked both in personam and subject matter jurisdiction and that the arbitrators had exceeded their powers. On appeal, Smith challenged the order of confirmation, judgment, and order compelling arbitration upon those grounds. Smith also challenged the constitutional jurisdiction of the district court to confirm the award and enter judgment against him upon the grounds that the arbitrators derived their authority, not from an arbitration agreement of the parties, but pursuant to the district court's interpretation that the Federal Arbitration Act overrode and supplanted crucial provisions of the arbitration clause; therefore, that the award of the arbitrators and judgment were the result of an

unconstitutional and ineffective delegation of the Article III, judicial power of the United States to an arbitration tribunal. See, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Snyder contends the Court of Appeals lacked jurisdiction to review these questions.

The Court of Appeals' construction of the Act, however, is a constitutional one in contrast with the district court's construction which might well have resulted in the Act's violation of Article III as so construed.

Snyder's asserted basis for review by this Court is a supposed conflict of the Court of Appeals' decision in this case with this Court's decision in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). Snyder's belief in this basis for review is misplaced. Firestone

was an appeal from an interlocutory order. Smith appealed from final judgment and posted bond to stay the execution threatened by Snyder.

The Court of Appeals considered and distinguished Firestone upon the grounds that this Court in Firestone "did not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court." (App. 37, 38.) Moreover, Snyder's petition by omitting part of the essential holding misstates the rule of Firestone. The Eighth Circuit had before it in Firestone an appeal from an interlocutory order which was not appealable. This Court held:

> We hold that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior

> to final judgment in the underlying litigation ... A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.

Id. at 379.

In contrast, the Seventh Circuit in this case had before it a timely appeal from a final judgment and thus had jurisdiction to consider the record brought up by that appeal.

The distinction between the two cases is that the Eighth Circuit in Firestone lacked "discretion to consider the merits of a case over which it is without jurisdiction....," id. at 379, while the Seventh Circuit had jurisdiction to consider plain error in the record brought up by timely appeal from final judgment. For this reason there is no conflict in the two decisions.

Snyder has not been prejudiced in a legal sense, as she contends, by the decision of the Seventh Circuit. Snyder's delays and expense were self-inflicted and result solely from her wilful refusal to follow the clear directions of the arbitration clause in the Partnership Agreement.

Snyder cites no authority for the contention that failure to appeal the order compelling arbitration forever deprived the Court of Appeals of jurisdiction to consider plain error occurring either before or after the docketing of the order.

Snyder cites six Court of Appeals decisions at page 17 of the petition as the weight of authority that "an order compelling arbitration ... was a final appealable order under 28 U.S.C. § 1291." Those six cases all appear to be distinguishable

from the case sub judice upon the grounds that the final action in each appeared to be the order compelling arbitration, no jurisdiction being retained as in the case sub judice for any other purpose, and no other legal or factual issue being subsequently resolved by those district courts. This Court ruled in Catlin v. United States, 324 U.S. 229, 236, 65 S. Ct. 631, 635 (1945) (in affirmance of the Seventh Circuit), "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." Moreover, the Advisory Committee's Notes under Rule 12(h)(3) of the Federal Rules of Civil Procedure state that "lack of jurisdiction over the subject matter [is] expressly preserved against waiver." No court of appeals has ruled in a case like this one that error like the error corrected by the Seventh

Circuit is waived and not reviewable by failure to appeal from an order compelling arbitration.

For the above reasons, the jurisdictional decision of the Seventh Circuit in this case is consistent with decisions of this Court and courts of appeals for other circuits. The district court's lack of statutory power under the Arbitration Act and constitutional lack of power under Article III, Section 1, to read the controlling clause out of the Arbitration Act, compel arbitration, confirm an award, and enter judgment thereon, are all questions presented to the Court of Appeals by Smith's timely notice of appeal from the final money judgment and within its jurisdiction. See Blaski v. Hoffman, 260 F.2d 317, 321 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct.

1084, 4 L. Ed. 2d 1254 (1960); Behimer v. Sullivan, 261 F.2d 467 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960).

CONCLUSION

For the above reasons, Snyder's petition should be denied.

Respectfully submitted,

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